IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 45 OF 2004

Sainath Naik,
House No.163,
Viaswado, Collem,
Sanguem-Goa
presently lodged in
Central Jail,
Aguada - Goa ... Appellant

versus

S T A T E
(through Collem Police Station,
Collem - Goa) ... Respondent

Mr. R. V. Kamat, Advocate for the Appellant.

Mrs. W. Coutinho, Additional Public Prosecutor for the Respondent.

CORAM : A. P. LAVANDE &
N. A. BRITTO, JJ.

DATE OF RESERVING
THE JUDGMENT: 23-2-2005.

DATE OF PRONOUNCING
THE JUDGMENT: 2-3-2005.

JUDGMENT(PER N. A. BRITTO, J.)

This appeal is filed by the accused in Sessions Case No.32/2001 against the Judgment/Order dated 8/9th July, 2004 of the learned Ist Additional Sessions Judge, South Goa, Margao, convicting and sentencing him under Section 302 I.P.C. to undergo imprisonment for life and to pay a fine of Rs.5000/- and in default to undergo imprisonment for a further period of 3 months.

2. The accused who was 35 years of age was charged and tried for committing the murder of his elder brother Namdev P. Naik, aged 39 years. The accused was residing in their ancestral house along with his wife and their mother Maghan Naik/P.W.12, while the deceased was staying with his wife, Namrata and their daughter, P.W.10/Neha along with her two younger brothers in a hut near the said ancestral house. On 1-7-2001 at about 6.30 hours the wife of the deceased P.W.1/Namrata went for work to return only in the evening. The accused went to Mapusa at 7.00 hours only to return at about 16.30 hours. Around that time the deceased in a drunken state started abusing their mother P.W.12/Maghan and when the

accused told the deceased Namdev to keep quite, deceased Namdev continued to abuse their mother P.W.12/Maghan and it is the case of the prosecution that the accused assaulted the deceased Namdev with a danda on his head, chest, abdomen etc. who fell on the ground with bleeding injuries. P.W.12/ Maghan and P.W.8/Joaquim Diniz then took the deceased to his hut and called P.W.9/Dr.Uday Kakodkar who upon examination found Namdev was dead. P.W.15/P.I. Raut Dessai received a phone message from an unknown person stating that the deceased Namdev died in a suspicion manner and, therefore, he came to the scene and got a first information report recorded from P.W.1/Namrata. Thereafter, P.W.15/P.I. Raut Dessai conducted a panchanama of the scene of offence, sent the dead body for post mortem and arrested the accused who was found sitting there. P.W.11/Dr. Rodrigues who conducted the post mortem examination of the deceased found that the deceased had as many as 12 injuries some of which were abrasions, 2 lacerations and others rail road pattern bruises. Dr. Rodrigues found that the deceased had died due to the injuries on the head, chest and abdomen. Dr. Rodrigues had also examined the accused and found that the accused had one abrasion on the lower front knee caused by blunt object or surface. Dr. Rodrigues also stated that

the accused had told him that the deceased had abused and tried to hit him and he had taken the same wooden piece and assaulted his brother on the head and the chest.

3. The prosecution had examined as many as 15 witnesses and upon consideration of the evidence led by the prosecution, the learned Additional Sessions Judge came to the conclusion that the accused had committed an offence punishable under Section 302 I.P.C. and, therefore, proceeded to sentence the accused with life imprisonment, as aforesaid.

4. At the time of hearing of this appeal, the only submission made by Mr. R. V. Kamat, the learned Counsel of the accused is that the learned Additional Sessions Judge on the facts proved by the prosecution could not have convicted the accused under Section 302 I.P.C. because at no time there was any intention on the part of the accused to commit the murder of his brother, the deceased. Mr. Kamat, the learned Counsel has next submitted that the accused assaulted the deceased on the spur of the moment as the deceased under influence of alcohol was found abusing their mother.

5. Before considering the said submission made on behalf of the accused, it is necessary to state that the learned Additional Sessions Judge convicted the accused based on ocular and circumstantial evidence. P.W.10/Neha, the daughter of the deceased, was 6 years old at the time of incident and 8 years old at the time of her deposition before the learned trial Court. The learned Additional Sessions Judge who had examined her had found that she was in a position to understand the questions put to her and give rationale answers to them. The learned Additional Sessions Judge who pronounced the Judgment has come to the conclusion, after much discussion that P.W.10/Neha was a reliable witness and that apart her evidence was also substantially corroborated. The learned Additional Sessions Judge observed, and in our view rightly that P.W.1/Namrata had not forced her daughter to depose what she did because P.W.1/Namrata could herself come forward as an eye witness and create false evidence since otherwise she had reached home soon after the incident. Likewise, the Additional Sesssions Judge had also rightly observed that P.W.12/Maghan who did not want to implicate her own son, though she was present at the time of incident, would not have forced P.W.10/Neha to depose in a manner deposed to by her. Indeed, the presence of P.W.10/Neha

at the scene of offence was confirmed by P.W.8/Joaquim to whom she referred as an uncle, and who along with P.W.12/Maghan had taken the deceased and kept him in the hut. P.W.8/Joaquim had also stated that when he went near the house to see as to what had happened he had seen that the deceased Namdev had fallen on the ground. He also made a categorical statement that Namdev was assaulted by his brother with a danda. P.W.7/Rosy Mascarenhas had also stated that she was told by P.W/10/Neha, the daughter of Namdev that her uncle had assaulted her father and the said Namdev had a bleeding injury on his head. Then there was evidence of admission made by the accused to P.W.11/Dr.Rodrigues that he had taken the same danda and assaulted his brother on the head, chest etc. The learned Additional Sessions Judge has tried to brush aside the said admission made by the accused to P.W.11/Dr. Rodrigues by observing that the said statement made by the accused was not recorded in the immediate presence of the Magistrate. However, it is to be noted that the said admission was made in connection with the injuries the accused had, and therefore, it did not amount to a confession to attract the ban imposed by Sections 24 to 26 of the Evidence Act. This aspect has been elaborately considered by this Court in Criminal

Appeal No.56/2003 in the case of **Prakash Parab** v. **State.** In our view, therefore, the prosecution had sufficiently proved that it is the accused who had assaulted the deceased and caused injuries to him which resulted in his death.

6. In our view, the submission made by Mr. Kamat, the learned Counsel of the accused cannot be simply brushed aside. As already stated in the admission made by the accused before P.W.11/Dr. Rodrigues the accused had stated that he had taken the wooden danda from the deceased when he tried to hit him and assaulted him on his head, chest etc. P.W.8/Joaquim also made a statement that there used to be constant fights between the deceased and his mother and that he had heard them shouting and fighting with each other from the time of marriage of the deceased Namdev. P.W.10/Neha also stated that there was a fight between her father and her grandmother i.e. to say they were abusing each other. She also stated that there used to be fights between her grandmother and her father even prior to the incident. From her evidence it does not appear that she had seen the accused removing the danda from the wooden fence, but she had seen the accused only thereafter assaulting the deceased with the said danda. P.W.12/Maghan, their mother,

stated that she had told the deceased Namdev that he takes the opportunity to fight with her whenever the accused was not around and to which the deceased Namdev had replied that he and the accused were not so great that he should be scared of them and that at that time Namdev was under the influence of alcohol. If the said story of P.W.12/Maghan is to be believed, and we have no reason why we should not have believed, it appears to us that it is quite probable that it is the accused who brought the danda first from the fence with a view to challenge his mother as well as the accused and it is only thereafter that the accused snatched the danda from the deceased and assaulted him over his head, chest, etc. In such a situation intention to kill the deceased could not be attributed to the accused, but knowledge that the blows given by him on the head and chest could cause death could be attributed to the accused. In our view, this would be a fit case to scale down the conviction from Section 302 to Section 304(ii) I.P.C., and consequently reduce the sentence from life imprisonment to 5 years rigorous imprisonment. The sentence of fine shall remain unaltered and in case the fine is paid it shall be paid by way of compensation to P.W.1/Namrata. Consequently, we modify the Judgment/Order of the learned Additional Sessions Judge dated

8/9th July, 2004. Needless to observe the said sentence shall be deemed to have commenced from 1-7-2001.

A. P. LAVANDE, J.

N. A. BRITTO, J.

RD.